

TAN CHIW THOO

a

v.

TEE KIM KUAY

FEDERAL COURT, KUALA LUMPUR
CHONG SIEW FAI CJ (SABAH & SARAWAK)
PEH SWEE CHIN FCJ
MOHAMED DZAIDDIN FCJ
[CIVIL APPEAL NO: 02-342-1993]
20 NOVEMBER 1996

b

LAND LAW: *Indefeasibility of title and interests - Registration - Same plot of land having two documents of title - Whether title that was registered earlier prevails - Whether alienation to second titleholder a nullity.*

c

LAND LAW: *Land Administrator or Collector - Rights, powers and jurisdiction - Whether compromise agreement signed before Collector pursuant to enquiry a decision of the Collector - Whether only appealable under s. 418 of National Land Code 1965 - Whether a Court of competent jurisdiction - Section 27.*

d

CONTRACT: *Agreement - Compromise agreement - Sufficiency of consideration - Extent of Court's enquiry.*

e

CONTRACT: *Agreement - Compromise agreement - Promise to refrain or forbear from litigating a claim - Whether constitutes good consideration - Whether must be bona fide - Whether consideration still sufficient if claim is doubtful - Whether claim can be frivolous or vexatious.*

f

The instant appeal concerned a single piece of land for which two documents of title were issued. The respondent was issued with a document of title registered in September 1968 whilst the appellant was issued with another document of title registered in December 1972.

g

As it transpired, the respondent issued a writ against the appellant claiming vacant possession and damages for loss of income. The trial Judge allowed the respondent's claim on account that his title prevailed over that of the appellant as it was registered earlier. The trial Judge also rejected as invalid a written compromise agreement ('the compromise') between the parties.

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Before the instant Court, Counsel for the appellant argued that the compromise was a 'decision' of the Collector of Land Revenue of Kuala Selangor ('the Collector'), and thus, if the respondent was unhappy with the decision he should have appealed against it under s. 418 of the National Land Code 1965 ('the NLC').

i

a Held:

Per Peh Swee Chin FCJ (delivering the judgment of the Court):

- [1]** The indefeasibility of the title of the respondent could not be challenged. The document of title of the appellant was void against the respondent.
- b [1a]** Alternatively, the appellant's document of title was also void because the said land could not be alienated by the state authority as it was no longer state land. The purported alienation of the said land to the appellant was a nullity.
- c [2]** The compromise which was signed before the Collector at the enquiry was not a decision of the Collector; even if it were, it would not have amounted to *res judicata*. One of the conditions for the defence of *res judicata* or *estoppel per rem judicatam* is that the question of title as disputed between the parties must have been decided earlier in a Court of competent jurisdiction.
- d [2a]** The compromise, on its true construction, was a compromise of the dispute between the parties in respect of the land. In respect of compromise agreements, the Courts will often enquire into the sufficiency but not the adequacy of the consideration involved; sufficiency in law is synonymous with validity.
- e [2b]** The consideration for such compromise agreements may often be one's *bona fide* promise to refrain or forbear from litigating a claim in exchange for a promise from the other party to give up a bit of or part of that which that other party claims. If the claim is actually good and enforceable, the consideration is no doubt sufficient or valid. However, if the claim is a doubtful one, the consideration is still valid or sufficient. So long as the claim is not frivolous or vexatious, it will render the consideration for the compromise agreement valid or sufficient although it may be a doubtful claim. In the instant appeal, the appellant's claim was not vexatious or frivolous although it was doubtful; consequently, the compromise was valid and binding.
- f**
- g**

[Order accordingly.]

h [Bahasa Malaysia Translation of Headnotes]

- UNDANG-UNDANG TANAH:** Ketidak-boleh sangkal hakmilik dan kepentingan - Pendaftaran - Plot tanah yang sama mempunyai dua dokumen hakmilik - Samada hakmilik yang didaftarkan terdahulu mengatasi - Samada pemberimilikan kepada pemegang hakmilik kedua
- i** merupakan suatu pembatalan.

UNDANG-UNDANG TANAH: *Pentadbir Tanah atau Pemungut - Hak, kuasa dan bidangkuasa - Samada perjanjian kompromi yang telah ditandatangani di hadapan pemungut selaras dengan satu siasatan merupakan satu keputusan pemungut - Samada hanya boleh dirayui di bawah s. 418 Kanun Tanah Negara 1965 - Samada merupakan Mahkamah bidangkuasa kompeten - Seksyen 27.*

a

b

KONTRAK: *Perjanjian - Perjanjian kompromi - Balasan yang mencukupi - Had siasatan Mahkamah.*

KONTRAK: *Perjanjian - Perjanjian kompromi - Janji untuk menahan diri daripada melitigasikan satu tuntutan - Samada membentuk satu balasan yang baik - Samada haruslah bona fide - Samada balasan masih mencukupi jika tuntutan meragukan - Samada tuntutan boleh menjadi remeh dan menyusahkan.*

c

Rayuan semasa ini berkaitan dengan sebidang tanah bagi yang mana dua dokumen hakmilik telah dikeluarkan. Responden telah diberikan satu dokumen hakmilik yang telah didaftarkan dalam bulan September 1968 sedangkan perayu pula telah diberikan satu dokumen hakmilik yang lain berdaftar dalam bulan Disember 1972. Sepertimana yang diketahui, responden telah mengeluarkan satu writ terhadap perayu, menuntut milikan kosong dan gantirugi bagi kehilangan pendapatan. Hakim perbicaraan telah membenarkan tuntutan responden atas alasan bahawa hakmiliknya mengatasi hakmilik perayu kerana ianya telah didaftarkan lebih awal. Hakim perbicaraan telah juga menolak sebagai tak sah satu perjanjian kompromi bertulis ('kompromi tersebut') antara pihak-pihak itu.

d

e

Di hadapan Mahkamah semasa ini, Peguam bagi pihak perayu telah berhujah bahawa kompromi itu adalah suatu "keputusan" Pemungut Hasil Tanah Kuala Selangor ('Pemungut tersebut'), dan dengan itu, jika responden tidak berasa senang dengan keputusan itu beliau seharusnya telah merayu terhadapnya di bawah s. 418 Kanun Tanah Negara 1965 ('KTN tersebut').

f

Diputuskan:

g

Oleh Peh Swee Chin HMP (menyampaikan penghakiman Mahkamah):

[1] Hakmilik responden yang tidak boleh disangkal tidak boleh dicabar. Dokumen hakmilik perayu adalah tak sah berbanding dengan responden.

h

[1a] Secara alternatifnya, dokumen hakmilik perayu adalah juga tak sah kerana tanah tersebut tidak boleh diberi milik oleh pihak berkuasa negeri kerana ianya bukan lagi merupakan tanah kerajaan negeri. Pemberimilikan tanah tersebut yang dimaksudkan kepada perayu adalah suatu pembatalan.

i

- a* [2] Kompromi yang telah ditandatangani di hadapan Pemungut disiasat itu bukannya merupakan keputusan Pemungut, jika pun sedemikian rupa, ianya tidak akan membawa kepada *res judicata*. Salah satu syarat bagi pembelaan *res judicata* atau *estoppel per rem judicatam* adalah bahawa persoalan hakmilik sepertimana yang dipertikaikan antara pihak-pihak itu mestilah diputuskan lebih awal lagi dalam sebuah Mahkamah bidangkuasa kompeten.
- b*
- c* [2a] Kompromi itu, atas pembentukannya yang sebenarnya, adalah suatu kompromi pertikaian antara pihak-pihak itu berhubung dengan tanah. Berhubung perjanjian-perjanjian kompromi, Mahkamah-Mahkamah akan selalunya menyiasat kecukupan tetapi bukan kelayakan balasan yang terlibat; kecukupan di sisi undang-undang adalah sinonim dengan keesahan.
- d* [2b] Balasan bagi perjanjian-perjanjian kompromi yang sedemikian mungkin selalunya menjadi janji *bona fide* seseorang untuk menahan diri daripada melitigasikan satu tuntutan sebagai ganti bagi satu janji daripada pihak yang lain untuk menyerahkan sebahagian daripada apa yang dituntut oleh pihak yang lain itu. Jika tuntutan itu sebenarnya baik dan boleh dikuatkuasakan, balasan itu tidak diragui lagi adalah mencukupi atau sah.
- e* Walaubagaimanapun, jika tuntutan itu merupakan sesuatu yang meragukan, balasan itu adalah masih sah atau mencukupi. Asalkan tuntutan itu tidak remeh atau menyusahkan, ianya akan menjadikan balasan bagi perjanjian kompromi itu sah atau mencukupi walaupun ianya mungkin suatu tuntutan yang meragukan. Dalam rayuan semasa, tuntutan perayu adalah tidak menyusahkan atau remeh walaupun ianya meragukan; akibatnya,
- f* kompromi itu adalah sah dan mengikat.

[Perintah sehubungannya.]

Cases referred to:

- g* *Land Executive Committee of the Federal Territory v. Syarikat Harper Gilfillan Berhad* [1981] 1 MLJ 234 (cit)
- Bank Bumiputra Malaysia Bhd. v. Mahmud bin Haji Mohd Din (Datin Hajjah Salma bte Mohd Jamin)* [1989] 1 CLJ 1048 (cit)
- Tham Kong v. Oh Hiam & Ors.* [1968] 1 MLJ 44 (cit)
- Pow Hing & Anor. v. Registrar of Titles, Malacca* [1981] 1 MLJ 155 FC (cit)
- h* *Paul Murugesu v. Cheok Tok Gong & 4 Ors.* [1996] 2 CLJ 397 (cit)
- Miles v. New Zealand Alford Estate Co.* [1886] 32 Ch D 266 (foll)
- American Cyanamid Co. v. Ethicon Ltd.* [1975] 396 AC (cit)
- Callisher v. Bischoffsheim* [1869-1870] 5 LRQB 449 (refd)
- United Provinces Government v. Church Missionary Trust Association Ltd.* [1948] AO 54 (cit)
- i* *Tinsukia Municipal Board v. Harikissen* [1957] A Assam 10 (cit)

Legislation referred to:

Land Code 1926, s. 107(i)

National Land Code 1965, ss. 27, 206(1)(b), 206(3), 214(1)(a), 340(3), 418

Rules of the High Court 1980, O. 18 r. 19(1)(b)

Subordinate Courts Act 1948, ss. 70(4), 71

[Appeal from High Court Malaya, Kuala Lumpur; Civil Suit No: F22 of 1982]

For the appellant - Zainur Zakaria; M/s. Zainur Zakaria & Co.

For the respondent - Karpal Singh; M/s. Karpal Singh & Co.

JUDGMENT**Peh Swee Chin FCJ:**

At times, one cannot resist a pun, thus, this case is not “A Tale Of Two Cities” but a tale of two documents of title for an identical piece of land, being State land prior to the issue of the earlier of the two documents of title, and being also lot No. 1898, Mukim Ijok, Daerah Kuala Selangor, due no doubt to some bureaucratic bungling. Lot No. 1898 is hereafter referred to as the said lot.

The respondent herein, (hereafter called the 1st titleholder), was issued with a document of title of the said lot registered in September 1968, (Exh. AB-1) while the appellant herein (hereafter called the 2nd titleholder), was issued with another document of title for the said lot also, registered in December 1972. The two different dates of registration for the two documents of title are significant, for legally, any alienation of State land shall take effect only upon the registration of a document of title thereto. The 1st title holder’s document of title was registered earlier.

The 1st titleholder caused to be issued a writ against the 2nd titleholder, claiming to be the registered owner of the said lot, alleging that the 2nd titleholder had been in unlawful occupation of the said lot. The 1st titleholder claimed vacant possession of the said lot and a sum of RM60,000 being loss of income for 10 years at RM500 p.m. The pecuniary claim was unexplained in the statement of claim, neither was it particularised.

The statement of defence of the 2nd titleholder said that he was the lawful owner by virtue of the document of title for the said lot having been issued to him and, therefore was not obliged to comply with the request to vacate the said land.

It is crystal clear from the evidence that the case below was conducted by both parties for the purpose of resolving a dispute to the ownership to the said lot without any serious question of facts. Learned Counsel for the 1st titleholder submitted that the first issue was whether the 1st titleholder had

a better title to the said lot, (p. 49 of the appeal record) and his opposing Counsel likewise submitted so, (p. 76 of the appeal record). Faced with such evidence and submissions, the Court below correctly directed itself that the first issue to be decided was the question as to who had a better title to the said lot.

b From the nature of the whole case, it savours of nothing but a claim by each party to the entitlement to the said lot to the exclusion of the other, and not just a claim for possession. It is to be borne in mind that the dispute between the parties to the said lot has been simmering for a long time for the learned trial Judge referred also to the evidence of the 2nd titleholder having started work on the said lot some time near 1965 and having been disturbed some
c three months later by people sent by the 1st titleholder.

The learned trial Judge held allowing claim of the 1st titleholder, that the 1st title holder's document of title, having been registered earlier than that of the 2nd titleholder, prevailed over that of the 2nd titleholder. Judgment was so given
d by the learned Judge despite an earlier alleged compromise by both parties of their dispute in the form of an agreement in writing, which the learned trial Judge found to be invalid. More about this later.

The parties have so clearly wanted a just determination of their long-standing dispute yet the nature of pleadings would appear to suggest a claim for
e possession of land, and by clear implication, on the basis of trespass, and a resistance to such claim on the basis of lawful occupation. If parties had wanted the Court to take them off from the boil of their dispute as to ownership of the said lot, the pleadings have failed to make that clear, by failing to claim, for example, a suitably worded declaration that so-and-so is
f the sole rightful owner, etc.

It was with some trepidation when we began to hear the present appeal. At the outset of the hearing, we enquired of both learned Counsel, to the effect, as to whether they wanted the Court to hear the appeal on the same basis of the learned trial Judge in resolving the claim for ownership of land and with consequential orders and directions if necessary as the pleadings were defective in failing to make this clear. Both learned Counsel replied to the effect that they wanted this Court to do so. With the pleadings point thus out of the way, we proceeded to hear them on merits so as to do justice between the parties, justice which almost eluded them on account of their incomplete
g pleadings.
h

It is only necessary to recapitulate some parts of the relevant evidence.

The 2nd titleholder said when the 1st titleholder sent people to disturb his possession of the land on which he had worked, he complained to the Land
i Office in 1965, twice for that year. To cut the story short, consequently, it cannot be disputed too, that the then Collector of Land Revenue of Kuala

Selangor then issued a notice of an enquiry dated 23 June 1972 to be held on 6 July 1972 before him. It was issued pursuant to s. 27 of the National Land Code. Both parties were later asked at a resumed enquiry to settle the matter on 22 August 1972. On 22 August 1972, both parties herein signed an agreement to compromise their dispute in the presence of the said Collector. This agreement (hereafter called ‘the compromise agreement’) is set out below:

Kami, Tan Chiw Thoo, K.P. No. 5679525 dan Tee Kim Kuay, K.P. No. 5679644, yang tinggal di Simpang Ijok, dengan ini bersetuju menerima ½ bahagian daripada Lot 2 1898 dan P.T. 13, Mukim Ijok sebagaimana yang telah ditetapkan oleh Pemungut Hasil Tanah, Kuala Selangor pada hari ini dan Encik Tee Kim Kuay akan membayar saguhati sebanyak RM1,800 kepada Tan Chiw Thoo pada 15 September 1972 di hadapan Pemungut Hasil Tanah, Kuala Selangor.

Under the terms of the compromise agreement, each of the parties herein would get a half undivided share of the said lot, and in addition, the 1st titleholder agreed to pay compensation in the sum of RM1,800 to the 2nd titleholder because, even according to the evidence of the 1st titleholder, the 2nd titleholder had planted oil palm on the said lot.

The 1st titleholder said in evidence he was asked to sign it and to him, he said it was not possible that he would pay RM1,800 and hand over part of the land to the 2nd titleholder. He said he could not remember whether he accepted the compromise agreement or not.

The 2nd titleholder said the compromise agreement was signed before the said Collector after agreement to it was reached by both parties.

The 1st titleholder had not up to date of trial paid anything to account of the said sum of RM1,800 to the 2nd titleholder; and it must have, to the latter, added insult to injury when the learned trial Judge ordered him to pay, instead, a sum of RM60,000 as damages together with interest to the 1st titleholder.

The argument before us was centred on the validity of the compromise agreement which the learned trial Judge held to be void.

Learned Counsel for the 2nd titleholder argued before us that the learned trial Judge was wrong in the conclusion aforesaid because the compromise agreement was a “decision”, by the said Collector, the emphasis for it having been a decision came from the words “ditetapkan”, i.e. “decided” in the passive voice. If the 1st titleholder was unhappy with the decision, he should have appealed against it under s. 418 of the National Land Code (hereafter called ‘the Code’), but he did not do so. The learned trial Judge had failed to consider this at all.

- a* It was further submitted for the 2nd titleholder that the said Collector had power to adjudicate in the dispute as to land in an enquiry under s. 27 of the Code.
- b* It was further submitted for the 2nd titleholder that the civil suit of the 1st titleholder was therefore wrong, and for this, he relied on *Land Executive Committee of the Federal Territory v. Syarikat Harper Gilfillan Berhad* [1981] 1 MLJ 234.
- c* On the other hand, it was submitted for the 1st titleholder that the said Collector had no power to adjudicate in dispute to land; and that the enquiry under s. 27 of the Code either could only be held on an order of the Court, and in the absence of such a Court order, only according to the provisions of the Code. Since the enquiry was not held on either of the grounds, the compromise agreement was not a decision appealable only under s. 418 of the Code. Counsel submitted further with his usual candour, in reply to a question from
- d* the Court, that the 1st titleholder was bound “technically” by the said agreement without prejudice to his contention that it was invalid.
- e* The main ground of the learned Judge which did not seem to have drawn any flak from learned Counsel was that the document of title for the said lot that was issued earlier to the 1st titleholder, had prevailed over the one that was issued to the 2nd titleholder on the ground of indefeasibility of title under s. 340 of the Code. Learned Counsel for the 2nd titleholder concentrated instead his argument on the compromise agreement signed subsequently by both parties herein before the said Collector. More about this later.
- f* The learned trial Judge, on the question of indefeasibility of title correctly relied on s. 340 of the Code and *Bank Bumiputra Malaysia Bhd. v. Mahmud bin Haji Mohd Din (Datin Hajjah Salma bte Mohd Jamin)* [1989] 1 CLJ 1048; [1989] 1 MLJ 381. Alienation of the said lot which was State land had taken effect upon registration of the register document of title to the 1st titleholder in September 1968. Such indefeasibility of title can only be defeated by any
- g* of the specified statutory grounds of fraud etc. under s. 340 or other grounds of equity, see for example, *Tham Kong v. Oh Hiam & Ors.* [1968] 1 MLJ 44. None of such statutory grounds or other grounds of equity relating to the issue of the said document of title to the 1st titleholder exists. The indefeasibility of title for the 1st titleholder cannot be challenged.
- h* Clearly, it follows that the document of title of the 2nd titleholder is void against the 1st titleholder. On another alternatively sufficient ground, apart from indefeasibility of title, it is void also as a document of title to land, and therefore against the 1st titleholder also, because the said lot could not be alienated by
- i* the state authority, since it was no longer State land. To alienate it in these

circumstances would be a wanton disregard of the express statutory provisions which provide for alienation only of State land such that it would amount to a failure to observe the mandatory statutory provisions of the Code. See *Pow Hing & Anor. v. Registrar of Titles, Malacca* [1981] 1 MLJ 155 FC. The purported alienation to the 2nd titleholder was a nullity, in our opinion, to such an extent on the facts of this case, that had there been a purchaser in good faith and for valuable consideration of the title of the 2nd titleholder, for the sake of illustration, such a purchaser would have obtained neither title nor interest of the said lot, in other words, the proviso to sub-s. (3) of s. 340 of the Code would not apply to assist such a purchaser.

The Court will consider making the necessary consequential directions for the cancellation of the 2nd title holder's document of title later, in order to provide, at least, an orderly realty market for the said lot.

The issue of indefeasibility of title mentioned above does not yet determine this case, there remains the main contention of the parties in relation to the compromise agreement.

On the factual side, 1st titleholder could not deny having signed the compromise agreement and his attempt in evidence to resile from it was so feeble as to border on the ludicrous. In our view, he is bound by it. The learned trial Judge, by only touching on its validity from purely legal aspect of it, could have come to the same view, though not in so many words.

About the legal aspect of the compromise agreement, in one respect, we must first of all stress that there has not been any suggestion that consent of either of the parties to the compromise agreement had been vitiated by any coercion, or undue influence, or fraud or misrepresentation or mistake. Rather, the suggestion has been that the compromise agreement is invalid or unlawful in other ways, apart from the implicit acknowledgement of both parties of the consent to the compromise agreement being free in the sense just stated.

Learned Counsel for the 2nd titleholder argued on the assumed basis that the said agreement was valid, that the said agreement was a decision appealable only under s. 418 of the said Code, but his opponent in Court submitted to the contrary. We do not set great store by this argument. Even if the said agreement that was reached before the said Collector amounted to a decision under the Code though we are unable to agree, the further legal consequence is that it amounts to an argument of *res judicata* that the matter could not be relitigated in the High Court below, such argument is not tenable.

Now, one of the conditions for the defence of *res judicata* or *estoppel per rem judicatam* is that the question of title as disputed between the parties must have been decided earlier in a Court of competent jurisdiction. We do

- a* not think the enquiry held by the said Collector is a Court of competent jurisdiction because the said Collector had not been given such power to adjudicate on such a dispute as to title under the Code. Further, the right of a Collector (nowadays designated as a Land Administrator under the Code) to hold an enquiry under s. 27 does not *ipso facto* confer on him the right to decide any matter or right whatsoever in connection with land. Power or jurisdiction, generally, must be expressed in, or implied irresistibly from any legislation and is not to be inferred lightly from it. For illustration, under the old Land Code of 1926, s. 107(i) provided a very limited jurisdiction to the Collector to decide possibly the question of title, as follows:

- c* Section 107(i). Any person asserting that he has a right otherwise than by succession to a deceased proprietor or by virtue of an agreement of sale to be registered in the mukim register as the proprietor of or as having an interest in land held under entry in the mukim register may, if the value of the land does not exceed RM3,000, apply to the Collector for an order that such memorial shall be made upon the entry in the mukim register as shall register him as such proprietor or as having such interest.
- d*

- e* This right in that section was taken away by the present Code which has not re-enacted in any form that old s. 107. It should be a sobering thought in this connection that even a Sessions Court whose civil jurisdiction in non-motor collision cases is up to RM250,000 has no right to determine any dispute to land (s. 70(4) of the Subordinate Courts Act 1948) except with consent of all parties in dispute (s. 71, *ibid*).

- f* We hold that the said agreement which was signed before the Collector at the enquiry is not a decision of the said Collector on the dispute to title, and even if it were, it would not have amounted to *res judicata*. We hold further that the dispute to title in this case could be and was properly litigated in the Court below.

- g* Learned Counsel for the 2nd titleholder said the compromise agreement was valid while learned Counsel for the 1st titleholder argued that it was invalid. The learned trial Judge held that it was invalid for two reasons set out below.

- h* The first reason was s. 214(1)(a) of the Code, which provides that only the transfer of the whole and not part of any alienated land is capable of registration under the Code just because the compromise agreement provided for the said lot to be transferred to both parties in equal shares (half undivided share each).

- i* However, it has been the accepted conveyancing practice among solicitors for many years and such practice has been recognised and even adopted by the Courts, that it would be lawful, using the said agreement for illustration, that the 1st titleholder can execute a transfer of the said lot to himself and to the

2nd titleholder, each to take half undivided share of it in one memorandum of transfer. Thus in the Federal Court in *Paul Murugesu v. Cheok Tok Gong & 4 Ors.* [1996] 2 CLJ 397; [1996] 1 MLJ 843, 855, the Federal Court referred to this and explained and approved it.

a

We therefore dissent, with respect, from the first reason of the learned trial Judge.

b

The second reason of the learned trial Judge for the conclusion that the compromise agreement was invalid was that the compromise agreement was not registrable as an “instrument” under s. 206(1)(b) of the Code which provides that no “instrument” affecting any dealing shall operate to transfer the title to any land etc. unless it has been registered under the provisions in connection with “dealings” of land.

c

With respect, we are unable also to agree to this reasoning which is, *inter alia*, oblivious of sub-s. (3) of the same s. 206 of the Code which provides:

d

Nothing in sub-s. (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein.

For our part, we share the same view of the learned Counsel for the 2nd titleholder that the compromise agreement was valid but for the following reasons.

e

The compromise agreement, on its true construction, is a compromise of the dispute between the parties herein about the said lot. Such a compromise is often linked up with the question of the validity of the consideration for such a compromise viz. the question of “sufficiency” of consideration. It must be remembered that “sufficiency” of consideration is different, in law, from the “adequacy” of consideration though any dictionary may show both words to bear the same meaning. In law, the Courts will often enquire into the “sufficiency” but not the “adequacy” of consideration, “sufficiency” in law is synonymous with “validity” in regard to consideration.

f**g**

A compromise of a dispute is always in the forefront of a disputed transaction with a background of a pending, or on-going or even an unspoken likelihood of litigation, such that parties would resort to a law Court should the negotiation for a compromise fail. The consideration for such a compromise is often therefore one’s promise to refrain or forbear from litigating a claim in exchange for a promise from the other of a promise to give up a bit of or part of that which the former promisor claims.

h**i**

a Now, if the said claim is actually good and enforceable, the consideration is no doubt sufficient or valid. If such a claim, on the other hand, is a doubtful one, the consideration is still valid or sufficient, and this position owes much *inter alia*, to the *dictum* of Bowen LJ in *Miles v. New Zealand Alford Estate Co.* [1886] 32 Ch. D. 266, 291 as follows:

b It seems to me that if an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong. It seems to me it is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he succeeds in his defence; and I think therefore that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession. Otherwise you would have to try the whole cause to know if the man had a right to compromise it, and with regard to questions of law it is obvious you could never safely compromise a question of law at all.

The words, “*bona fide*” in the above passage according to decided cases, either refer to conduct of the parties in question e.g., “the promisor *bona fide* believed ...” or the integrity of a compromise, e.g., “*bona fide* dispute”. They do not elaborate their nature and it is apt to cause a great deal of vagueness. After anxious consideration, we are of the view that the words, “*bona fide*” should be translated to mean the “consent” that leads to a compromise agreement has not been vitiated by fraud etc. as mentioned earlier in connection with free consent to an agreement and that would be incidentally a sense though broader but more definitive than the traditional meaning of the words, “*bona fide*” of absence of either fraud or unfair dealing. Such meaning is consonant with unspecified but the clear spirit in which the words have been used by Judges in the past in connection with such *bona fides* the absence of which would make a compromise agreement unenforceable or ungentuine. Further, fraud, coercion etc. are kinds of conduct which if proved, would vitiate any agreement so as to make it unenforceable.

The words “vexatious or frivolous” in the above passage from Bowen LJ, should, in our view, have the meanings always known to lawyers in the sense as understood or applied by the Courts (a) in relation to O. 18 r. 19(1)(b) of the Rules of the High Court 1980 where a Court may strike out any pleading, writ etc. on the ground that they are “... frivolous or vexatious” and (b) in relation to Lord Diplock’s use of the expression, i.e. “not being frivolous or vexatious” in contrast with the requirement of “a serious question for trial” in relation to an applicant for an interlocutory prohibitory injunction when giving the guidelines on a Court’s approach to an application by such an applicant in *American Cyanamid Co. v. Ethicon Ltd.* [1975] 396 AC. We think further

that the sense used in relation to (a) is a better guide for the present purpose than the sense used in relation to (b) because we venture to suggest that Lord Diplock used the expression, “not being frivolous or vexatious” as an unduly sharp contrast for purpose of illustration of “a serious question for trial” as if the “serious question” were on one extreme end of a spectrum while a “frivolous or vexatious” question on the other.

In other words, so long as the claim in a compromise agreement is not frivolous or vexatious even though it is doubtful, and subject to an absence of *mala fides* just explained, such a claim will make the consideration for the compromise agreement valid or sufficient. Examples of such a frivolous or vexatious claim are a gaming debt, or a claim which is clearly statute-barred and there are others, of course.

Applying what has been stated to the facts in the instant case, the claim by the 2nd titleholder to be the rightful proprietor of the said lot and for that matter, the similar claim of the 1st titleholder, could not be said to be frivolous or vexatious as both had the document of title to the said lot at the time of signing the compromise agreement, and it must have appeared that it was even more ‘rightful’ for the 1st titleholder whose document of title was registered earlier after the alienation of the said lot. It was in the circumstances of the case certainly not a vexatious or frivolous claim on the part of the 2nd titleholder in view also of other following circumstances in this case. The 2nd titleholder had worked on the land since about 1965 and the oil palm cultivated on the said land came from his sweat and possibly tears. He said the Collector or his State assemblyman all gave their ears to him also, probably with a great deal of sympathy. His claim, therefore, was at worst a doubtful claim, but certainly not frivolous or vexatious. All these circumstances could not have been lost on the mind of the 1st titleholder who must have found the circumstances persuasive enough for him to sign the compromise agreement.

We ought to deal with another aspect of this case before we give our judgment. We have in fact, held that the document of title of the 1st titleholder prevails over that of the 2nd titleholder on that ground of indefeasibility of title, etc. This means, in fact, that the Court has found the claim of the 2nd titleholder to be the rightful proprietor (by virtue of his document of title) to be unfounded or without legal basis, then the question arises whether this finding affects the validity of the compromise agreement. In our view, it matters not that the claim of the 2nd titleholder is now found to be unfounded in law, so long as his claim was not vexatious or frivolous at the time of the signing of the compromise agreement, even though it was doubtful; the said compromise agreement would still be valid and binding. Thus in *Callisher v. Bischoffsheim* [1869-1870] 5 LRQB 449, the plaintiff there believed he had a valid claim for £600 against the Government of Honduras and threatened to sue. Defendant

- a* agreed to deliver certain securities to the plaintiff in consideration of the plaintiff forbearing from taking such proceedings. Defendant failed to deliver them and it was found no money was due to plaintiff from the Honduras Government. It was argued that a groundless action afforded no consideration for the promise to deliver the securities to the plaintiff. Judgment was given to the plaintiff.
- b* Cockburn CJ with whom the other three Judges agreed, said:

- c* Our judgment must be for the plaintiff. No doubt it must be taken that there was, in fact, no claim by the plaintiff against the Honduras Government which could be prosecuted by legal proceedings to a successful issue; but this does not vitiate the contract and destroy the validity of what is alleged as the consideration. The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Everyday a compromise is effected on the ground that
- d* the party making it has a chance of succeeding in it, and if he *bona fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexatious incident to it. The defendant's contention is
- e* unsupported by authority.

This case was considered by Bowen LJ aforesaid, who himself referred to such a similar situation in his passage cited above.

- f* There are two Indian cases in similar vein fortifying the same proposition, see *United Provinces Government v. Church Missionary Trust Association Ltd.* [1948] AO 54 and *Tinsukia Municipal Board v. Harikissen* [1957] A Assam 10.

- g* We therefore hold that the consideration for the compromise agreement was valid or sufficient, and it is binding and enforceable.

We therefore allow the appeal, set aside the order of the Court below dated 23 June 1993 and make a further order that:

- h* (1) this Court declares that the document of title of the respondent i.e. H.S.(M) 64, Lot 1898, Mukim Ijok, Daerah Kuala Selangor, State of Selangor is valid and lawful while that of the appellant i.e. H.S.(M) 426, Lot 1898, Mukim of Ijok, Daerah Kuala Selangor, State of Selangor is void and a nullity;
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- (2) that the said document of title registered in the name of the appellant be surrendered by the appellant to the Land Administrator of the District of Kuala Selangor within one month from today for cancellation; *a*
- (3) that the Land Administrator of the District of Kuala Selangor do make all the necessary and sufficient memorials to effectuate such cancellation; *b*
- (4) this Court further declares that the agreement dated 22 August 1972 made by the parties herein is binding and enforceable;
- (5) that the respondent do execute a valid and registrable transfer of half undivided share of the said Lot 1898 in favour of the appellant aforesaid at the cost and expense of the appellant within one month from today and also deliver the said document of title in his name for the purpose of the said transfer also within one month from today, failing which, a Deputy Registrar of the Federal Court be and is hereby authorised to execute such a valid and registrable transfer for and on behalf of the respondent, and in the event of failure to deliver the said document of title, that the appellant be at liberty to apply for leave to file an application for order of committal against the respondent; *c*
d
- (6) that within one month from today the respondent do further pay a sum of RM1,800 to the appellant with interest at 4% p.a. thereon from 15 September 1972 to date of payment; and *e*
- (7) that the respondent herein do pay costs of this appeal but that there be no order as to costs in the Court below.

Reported by Gan Peng Chiang *f*

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